3-20-2012

State v. Russo Appellant's Brief 1 Dckt. 38404

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38404
	)	
v.	)	
	)	
MICHAEL ROWE RUSSO,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE GREGORY M. CULET
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Michael Russo was found guilty of one count of rape, one count of first degree kidnapping, and one count of burglary. He received an aggregate sentence of fixed life.

On appeal, Mr. Russo asserts two claims of error. First, he contends that the district court erred in failing to suppress a cell phone video discovered through a warrantless, non-consensual search of his phone. Second, he contends that the district court erred in allowing the State to present irrelevant, highly prejudicial evidence concerning his deviant sexual interests. Mr. Russo requests that his convictions and sentences be vacated, and that his case be remanded for a new trial.

Statement of the Facts and Course of Proceedings

In the pre-dawn hours of August 27, 2009, J.W. was raped at knifepoint by a masked man in her Nampa apartment. (*See* 8/2/10 Tr., p.200, L.18 – p.220, L.15.)[1] When her assailant left, J.W. quickly called 9-1-1 to report the crime. (8/2/10 Tr., p.191, L.17 – p.193, L.2 (testimony of police dispatcher), p.220, L.16 – p.221, L.2, p.22, Ls.2-4 (testimony of J.W.); Ex. 1 (recording of 9-1-1 call).)

The investigating officers who responded to J.W.'s report immediately decided that Michael Russo would be their suspect.[2] (*See* 8/3/10 Tr., p.289, Ls.18-22.) They

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[1] There are a large number of separately-bound transcripts in the record on appeal in this case. Accordingly, transcripts are identified herein based on the date of the hearing in question.

[2] Mr. Russo was convicted of rape in Washington in 1995. (R., p.129.) Based largely on this fact, he would contend, once he moved to Idaho, he became the "usual suspect" for any rape or seemingly related crime in the Meridian/Nampa area. (*See* R., pp.125-31 (police affidavit outlining the various crimes that Mr. Russo was accused of committing prior to this case coming about).) Notably, prior to this case coming about,

quickly set up surveillance at his Meridian apartment (8/3/10 Tr., p.289, L.24 – p.290, L.9, p.294, L.6 – p.296, L.21, p.350, L.7 – p.352, L.23) and, before too long, went about securing a search warrant for his residence (*see* 8/3/10 Tr., p.380, L.19 – p.381, L.18.) That warrant, authorizing searches of Mr. Russo's apartment and motorcycle, was eventually issued by an Ada County magistrate. (*See* R., pp.133-34; 8/3/10 Tr., p.381, Ls.15-17.)

While officers had Mr. Russo's apartment under surveillance (and before the search warrant had arrived), they observed Mr. Russo leave his residence three times—once to go behind his apartment building, and twice to check his mailbox. (R., p.142.) The third time Mr. Russo left his apartment, which was some time shortly before noon, at least two detectives seized, and then searched, him as part of what they referred to as "an investigatory detention."[3] (R., pp.139, 142; 1/27/10 Tr., p.68, Ls.19-23, p.70, Ls.13-14, 17-18.) Although they had not observed Mr. Russo do anything illegal, possess a weapon, or act in a threatening manner, the detectives immediately handcuffed him; searched him, supposedly for weapons; removed his wallet from one of his back pockets and his cell phone from one of his front pockets[4]; and then placed Mr. Russo in a patrol car. (R., pp.139, 142; 1/27/10 Tr., p.68, L.24 – p.70, L.19.) Approximately five minutes later, when another detective (Detective King) arrived,

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Mr. Russo had not been charged with any of the Idaho crimes for which he had been accused.

[3] When Mr. Russo asked if he was being arrested, one of the officers told him he was not; Detective Cain "told him it was called an investigatory detention." (R., p.142.)

[4] Although the evidence before the district court at the time that Mr. Russo's suppression motion was evaluated did not indicate whether Det. Cain knew that Mr. Russo's wallet and cell phone were not weapons when he removed them from Mr. Russo's pockets (*see* R., p.142), Det. Cain later testified at trial that he did know what they were before he removed them from Mr. Russo's pockets. (*See* 8/3/10 Tr., p.356, Ls.1-4.)

Mr. Russo's cell phone was handed over to that detective. (R., p.142; 1/27/10 Tr., p.70, Ls.21-25.) Thereafter, Det. King opened the phone and viewed its contents, supposedly "to determine ownership" of the phone,[5] whereupon he discovered a video believed to have been taken of the rape of J.W.[6] (R., p.154; 1/27/10 Tr., p.70, L.23 – p.71, L.2.) At some point after that, based (at least in part) on the video found on his cell phone, Mr. Russo was arrested. (*See* 1/27/10 Tr., p.75, Ls.11-25, p.81, L.24 – p.82, L.6.) Also based (at least in part) on the video found on the cell phone, the police obtained an amended warrant authorizing a search of that phone. (*See* R., pp.153-54 (relevant portion of affidavit in support of amended warrant), 155-57 (amended warrant).)

On September 3, 2009, a grand jury indicted Mr. Russo on one count of rape, one count of first degree kidnapping, and one count of burglary. (R., pp.10-12.)

On January 7, 2010, while he was awaiting trial, Mr. Russo filed, pursuant to the Fourth and Fourteenth Amendments of the United States Constitution, as well as Article I § 17 of the Idaho Constitution, a motion to suppress, *inter alia*, the evidence discovered on his cell phone.[7] (R., pp.73-75.) Mr. Russo argued that neither his detention and search, nor the search of his phone, was undertaken pursuant to a

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[5] At the time that it evaluated Mr. Russo's suppression motion, the evidence before the district court—a sworn affidavit in support of an amended search warrant—indicated that Det. King searched the phone's contents "to determine ownership." (R., p.154.) At trial, however, Det. King testified that he searched Mr. Russo's phone "to see if there was [sic] and photos or videos on there." (8/3/10 Tr., p.492, Ls.15-19.)

[6] The 8-second video clip depicts a close-up view of a male and a female engaged in vaginal intercourse. Because of the close-up view, no faces are visible and the identities of the participants, therefore, are not readily apparent. (*See* Ex. 49.)

[7] Mr. Russo sought suppression of certain evidence on two other grounds (*see* R., pp.73-80 (suppression motion challenging not only the search of the phone, but also the issuance of the search warrants and procurement of certain statements made after invocation of the right to silence/counsel); however, because those suppression arguments are not related to any issue raised on appeal, they are not discussed any further herein.

warrant, and that they exceeded anything that might be permissible pursuant to the *Terry*[8] exception to the warrant requirement. (*See* R., pp.73-75.)

In response, the State filed a memorandum in opposition (*see* R., pp.100-05, 111-22), and provided a documentary record by which the district court could discern the relevant facts (*see* R., pp.123-59 (exhibits 1 through 6, consisting of the affidavit in support of the original search warrant, the original search warrant itself, a police report prepared by Det. Palfreyman (one of the detectives who detained and searched Mr. Russo), a police report prepared by Det. Cain (the other detective who detained and searched Mr. Russo), the affidavit in support of the amended search warrant, and the amended search warrant)[9]). The State argued that Mr. Russo was properly detained because police can always detain the occupants of a residence while a search warrant is being sought for that residence; however, the State made no attempt to argue that the search of Mr. Russo's person and, subsequently, his phone, could have been proper. (*See* R., pp.111-14.) The State then argued that, even if the phone was searched illegally, the fruits of the search were not subject to exclusion because of either the attenuation doctrine, the inevitable discovery doctrine, or the independent source doctrine. (*See* R., pp.114-21.)

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[8] *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the United States Supreme Court, held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* at 30-31.

[9] Later, at the suppression hearing, the district court also agreed to take judicial notice of the transcript of the grand jury proceedings in finding the relevant facts. (*See* 1/27/10 Tr., p.20, Ls.6-25.)

A lengthy hearing, consisting solely of arguments of counsel, was held on Mr. Russo's suppression motion on January 27, 2010. (*See generally* 1/27/10 Tr.) At that hearing, defense counsel argued, *inter alia*, that Mr. Russo's phone could not be searched pursuant to the warrant authorizing a search of his home and motorcycle because the phone was located on Mr. Russo's person, and his person was outside when he was detained by the police. (*See* 1/27/10 Tr., p.34, Ls.18-25, p.51, Ls.16-20.) In response, the State appears to have augmented the argument presented in its briefing, this time asserting that the search of Mr. Russo's cell phone was permissible because the original search warrant authorized a search for phones (implicitly authorizing a search of those phones, the State argued) and, even if the original search warrant did not authorize the search, the amended warrant specifically authorized a search of that phone. (*See* 1/27/10 Tr., p.43, Ls.7-23.) The State also argued, as it had in its briefing, that regardless of the legality of the search of the phone, "inevitably, that cell phone would have been searched as Mr. Russo was being interviewed by Detective Weekes" (1/27/10 Tr., p.44, Ls.2-6); however, the State never explained how it was that an "investigatory detention" would have inevitably resulted in a search of Mr. Russo's phone (*see generally* 1/27/10 Tr., p.41, L.21 – p.47, L.13).[10]

The district court ruled on Mr. Russo's suppression motion from the bench at the January 27, 2010 hearing.[11] (*See* 1/27/10 Tr., p.80, L.11 – p.83, L.23.) The district

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[10] In its briefing, the State had argued that, even if the original search of the phone was unconstitutional, because the police were specifically looking for a cell phone that might contain photos or video of J.W.'s rape, having found a phone on Mr. Russo's person the police inevitably would have sought a warrant authorizing a search of that phone. (R., p.119.)

[11] A few days later, the district court did enter a written order denying Mr. Russo's motion; however, that order did not expand upon or clarify the district court's oral ruling, as it simply incorporated the "factual findings and conclusions of the law" made on the record at the hearing. (*See* R., p.166.)

court concluded that Mr. Russo was properly detained, but it did not reach the issue of whether either he (or his phone) was properly searched because the exclusionary rule would not apply anyway since the video on the phone would have inevitably been discovered. (1/27/10 Tr., p.81, L.22 – p.83, L.23.) The district court reasoned that it was inevitable that the video would have been discovered because, even though the first search warrant had not arrived yet, it had been issued and it authorized a search for phones and implicitly authorized a forensic search of those phones. (1/27/10 Tr., p.81, L.22 – p.83, L.23.)

Also prior to trial, the State sought leave to offer extensive evidence of Mr. Russo's alleged "other crimes, wrongs, or acts" pursuant to Idaho Rule of Evidence 404(b). (*See, e.g.,* R., pp.44-46 (original notice of intent to offer evidence under I.R.E. 404(b)), pp.47-51 (original motion *in limine*), 52-72 (memorandum in support of original motion *in limine*), pp.85-88 (reply memorandum in support of original motion *in limine*), pp.187-227 (offer of proof in support of original motion *in limine*), p.237 (second motion *in limine*), pp.228-35 (memorandum in support of second motion *in limine*).) Among the evidence the State sought to have admitted under Rule 404(b) was evidence that: (1) during a police interrogation, Mr. Russo had admitted to Detective Weekes that he had sexual fantasies involving rape; and (2) certain pornographic images depicting simulated rape were found in Mr. Russo's vehicle. After extensive proceedings on the State's proffered Rule 404(b) evidence, the district court ultimately found the rape fantasy evidence, and some of the rape pornography evidence, to be admissible. (*See* 3/18/10 Tr., p.67, L.14 – p.69, L.9, p.77, L.25 – p.78, L.7 (fantasy evidence), p.67, L.14 – p.68, L.10, p.78, Ls.7-10 (pornography evidence); 4/22/10 Tr., p.9, Ls.6-11 (fantasy evidence); 5/11/10 Tr., p.23, L.18 – p.28, L.2, p.29, L.23 – p.31, L.23 (pornography

evidence); R., pp.175-76 (both fantasy and pornography evidence), p.243 (pornography evidence).

Mr. Russo's case went to trial in August of 2010. (*See generally* 8/2/10 Tr.; 8/3/10 Tr.; 8/4/10 Tr.; 8/5/10 Tr.) It appears that, at trial, the cell phone video was admitted in two different forms.[12] First, Exhibit 47, a video made by the Idaho State Police as officers went through the contents of the cell phone including, presumably, the video in question, was admitted. (*See* 8/3/10 Tr., p.494, L.2 – p.497, L.15; Ex. 47.) Next, Exhibit 49, an "enhanced" version of the video, complete with still captures of certain frames, was admitted. (*See* 8/3/10 Tr., p.502, L.3 – p.511, L.11; Ex. 49.) In addition, there was substantial argument and testimony regarding the video. (*See, e.g.*, 8/2/10 Tr., p.185, Ls.14-20 (prosecutor's opening statement referencing the video and asserting that it "shows the defendant raping [J.W.]"); 8/2/10 Tr., p.226, Ls.1-19 (J.W.'s testimony that Det. King showed her a video, and that she identified herself in that video because "I know my vagina, and I know just how I am. I just knew it was me"); 8/3/10 Tr., p.492, Ls.20-25 (Det. King describing the contents of the video); 8/3/10 Tr., p.511, L.21 – p.512, L.5 (Det. King identifying certain characteristics of the female in the video); 8/4/10 Tr., p.91, L.17 – p.94, L.10 (Dr. Lisa Minge discussing the physiology of

[12] All of the exhibits in this case which contain sexual content, *i.e.*, Exhibits 4-6 (photos of the victim's pubic area), Exhibit 47 (video of officers going through Mr. Russo's cell phone), Exhibit 49 ("enhanced" video from Mr. Russo's cell phone), Exhibit 51 (pornography allegedly found in Mr. Russo's car), were retained by the district court. Accordingly, those exhibits have not yet been viewed by undersigned counsel. Contemporaneously herewith though, Mr. Russo is filing a motion to transport these exhibits to the Supreme Court (and held under seal), so that they may be viewed by undersigned counsel and considered in conjunction with this appeal. Obviously, if undersigned counsel's review of these exhibits reveals any error in this brief, counsel will take all appropriate steps to remedy that error. Likewise, if counsel's review of these exhibits changes the analysis as to which issues can or should be presented on appeal, or alters the analysis of any of the issues presented on appeal, counsel will seek leave to file a revised or supplemental brief.

the female in the video, comparing it to that of J.W., and offering her expert opinion that J.W. is the female in the video); 8/4/10 Tr., p.155, Ls.15-24, p.159, Ls.9-20 (prosecutor's closing argument reminding the jurors of the video and arguing that Mr. Russo and J.W. are the two individuals depicted therein).)

Also admitted at Mr. Russo's trial was evidence and argument concerning Mr. Russo's rape fantasies and his alleged possession of pornography depicting simulated rapes. With regard to the fantasies, the State offered the testimony of Det. Weekes, who detailed Mr. Russo's statements on this topic:

> Q. . . . . Did you and Mr. Russo have a conversation with regards to pornography?
>
> A. Yes, we did.
>
> Q. And can you briefly describe what you were talking about—or I'll back up.
>
> What type of pornography did he describe?
>
> A. He described watching pornography that depicted rape.
>
> Q. And did he tell you what happens when he watches this type of pornography?
>
> A. He did. He told me that it turns him on and it makes him want to have sex.
>
> Q. Did he, in your conversation, provide to you when he first started viewing this type of pornography?
>
> A. He did. Mr. Russo explained to me that he believed he was approximately 15 or 16 years old the first time he saw a video that depicted rape. And he described that portion of that video to me.
>
> Q. And what was his description?
>
> A. He told me that the video was a female that a male had taken out into the desert, and he had began raping this female. And in the video, during the rape, the female decided that she liked it and became happy and wanted to become a participant in it. And that's how he described that video taking place.

Q. And did he go further and to say what type of fantasies were developed from watching this video?

A. He talked—he talked to me about his fantasies that he had, yes.

Q. And what were those fantasies, detective?

A. He told me he had abnormal violent sexual fantasies.

Q. And can you briefly go into the conversation that you had with Mr. Russo and what he told you?

A. I was talking to him about his fantasies and explained to him—I told him that he didn't have fantasies like everybody else did. And he told me he had abnormal sexual fantasies. And I told him he had violent sexual fantasies. And initially, he told me he didn't. And I said, "Mike, rape is violent." And he said, "you're right. Rape is violent. I shouldn't deny that. I have violent abnormal sexual fantasies." But he minimized it by saying that but [sic] his fantasies—his words are he minimized that because at least in his fantasies, he wasn't hitting or punching someone.

Q. And did he go further into any specifics of what type of fantasy, exactly, that he had?

A. He did. He told me that he had a fantasy about raping a woman, and in the middle of it, she would decide she wanted it, and would basically become a willing participant in that.

(8/4/10 Tr., p.39, L.24 – p.42, L.9.)

With regard to the pornography, the State offered Exhibits 50 (a photo of Mr. Russo's Mazda 626) and 51 (printed pornographic images depicting simulated rape) through Detective King, who testified that the pornography was found in Mr. Russo's Mazda 626, along with registration and insurance paperwork for that vehicle showing Mr. Russo as the owner of that vehicle.[13] (*See* 8/3/10 Tr., p.513, L.13 – p.517, L.11, p.549, L.10-18.) Further, although the jurors could certainly have evaluated Exhibit 51

[13] Detective King also testified about rape pornography allegedly found in a Jeep Cherokee (*see* 8/3/10 Tr., p.517, L.22 – p.523, L.11, p.549, Ls.19-24); however, that testimony was later stricken based on the tenuousness of Mr. Russo's connection to that vehicle (*see* 8/4/10 Tr., p.96, L.22 – p.104, L.25, p.105, L.20 – p.106, L.6, p.109, Ls.9-25).

for themselves, Det. King nevertheless described the pornographic images depicted therein:

> A male holding a female down by the shoulders as she's nude. Another male penetrating her vagina with his penis. There's also another photo of the same female, her mouth being penetrated by the male. . . . Bride abuse is at the corner here, brideabuse.com. Well, I've seen this type of picture before, and I know what Bride Abuse is, so you can't see dot-com, but I believe it's brideabuse.com.

(8/3/10 Tr., p.516, Ls.16-25.)

Finally, in its closing argument, the State referenced both the rape fantasies and the rape porn as follows: "[R]eturn to what Detective Weekes and her conversations with Mr. Russo about his sexual fantasies, how this makes him feel powerful, how it makes him feel in control, these rapes. He watches the pornography. It has the rape in it." (8/4/10 Tr., p.159, Ls.3-8.)

Ultimately, the jury returned guilty verdicts on all counts. (8/5/10 Tr., p.5, L.18 – p.6, L.8; R., pp.369-70.) Thereafter, the district court imposed an aggregate sentence of fixed life. (*See* 11/30/10 Tr., p.96, Ls.4-16; R., pp.413-14.) The district court then entered its judgment of conviction on December 1, 2010. (R., pp.413-14.)

On December 28, 2010, Mr. Russo filed a notice of appeal. (R., pp.415-16.) On appeal, he contends that the district court erred in failing to suppress the cell phone video, and in allowing the State to offer evidence and argument concerning his deviant sexual interests.

ISSUES

1. Did the district court err in failing to suppress the video discovered by police in an unconstitutional search of Mr. Russo's cell phone?

2. Did the district court err in admitting irrelevant, highly prejudicial evidence concerning Mr. Russo's deviant sexual interests?

ARGUMENT

I.

The District Court Erred In Failing To Suppress The Video Discovered In An Unconstitutional Search Of Mr. Russo's Cell Phone

A. Introduction

The Fourth Amendment to the United States Constitution provides the following guarantee:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.[14] This text embodies a Constitutional preference that governmental searches and seizures be undertaken pursuant to warrants. Thus, it has been held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). "The burden of proof rests with the State to demonstrate that [a given warrantless] search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *State v. Weaver*, 127 Idaho 288, 290 (1995). Traditionally, it has been held that if the State fails to meet its burden in this regard, and the search in question is determined to be unconstitutional, the exclusionary rule precludes the State from using its ill-gotten evidence against the defendant at trial. *State v. Bunting*, 142 Idaho 908,

[14] The Idaho Constitution provides a guarantee that is virtually identical to that of the Fourth Amendment. *See* IDAHO CONST. Article I § 17.

915 (Ct. App. 2006); *see also Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (referring to the exclusionary rule as "an essential part of both the Fourth and Fourteenth Amendments").

In this case, the district court did not reach the issue of whether Mr. Russo or his phone were improperly searched; instead, it ruled that even if the searches were undertaken in violation of the Fourth Amendment, the exclusionary rule would not apply since the video found on the phone would have inevitably been discovered by the police anyway. (1/27/10 Tr., p.81, L.22 – p.83, L.23.) The district court reasoned that it was inevitable that the video would have been discovered because, even though the first search warrant had not arrived yet, it had been issued and it authorized a search for phones and implicitly authorized a forensic search of those phones. (1/27/10 Tr., p.81, L.22 – p.83, L.23.)

Mr. Russo submits that the district court's ruling was in error. Below, he explains why the searches of his person and his phone violated the Fourth Amendment. Thereafter, he explains why the "inevitable discovery" exception to the exclusionary rule does not apply and why the proper remedy for the Fourth Amendment violations, therefore, was exclusion of the ill-gotten evidence.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. The appellate court must accept those of the trial court's findings of fact which were supported by substantial evidence, but it can freely review the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561 (Ct. App. 1996).

C. The District Court Erred In Failing To Suppress The Cell Phone Video

As noted, Mr. Russo contends that the officers' search of his person, then his cell phone, was impermissible under the Fourth Amendment. This is so for two reasons: first, although a magistrate issued a warrant authorizing the search of his residence and motorcycle, that warrant did not extend to a search of his person where he was detained outside of his residence; second, the *Terry* exception to the warrant requirement cannot justify a search of Mr. Russo's person under the facts of this case and, even if it could, the search of Mr. Russo's phone was not a valid *Terry* search.

Mr. Russo further contends that, because discovery of the cell phone video was not inevitable under the facts of this case, the exclusionary rule applies such that the district court erred in failing to suppress the fruits of the officers' unconstitutional search of his phone.

1. Under *Michigan v. Summers*, 452 U.S. 692 (1981), Even If Mr. Russo Was Properly Detained While Officers Obtained And Executed A Search Warrant For His Residence, He Could Not Be Searched Pursuant To That Warrant

Michigan v. Summers involved facts analogous, in many respects, to those in this case. In *Summers*, police were preparing to execute a search warrant on a residence when they encountered the owner of the house heading down his front steps; the officers detained him and, eventually, searched him (finding contraband on his person). *Summers*, 452 U.S. at 693. The question in that case was whether the Fourth Amendment permits officers to temporarily detain the occupant of a residence while they search the house pursuant to a warrant issued by a magistrate. *Id.* at 694. The Supreme Court held that it does. *Id.* at 705.

In light of the United States Supreme Court's holding in *Summers*, therefore, there is little doubt that the police in this case were acting within the strictures of the Fourth Amendment when they detained Mr. Russo outside his home as they obtained and executed a search warrant for his home. *See id.*; *see also Illinois v. McArthur*, 531 U.S. 326, 331-34 (2001) (finding no Fourth Amendment violation in the detention of the occupant outside of his home (in what was less than a full arrest) while a search warrant was being obtained).

However, just because Mr. Russo could be detained to: (1) "prevent[ ] flight in the event that incriminating evidence is found"; (2) "minimize[e] the risk of harm to the officers"; and (3) facilitate "the orderly completion of the search," *i.e.*, provide access to the police so that they did not destroy his residence, *id.* at 702-03, that does not mean that he could also be searched. In fact, the *Summers* Court spoke to this very issue and held that because the occupant was found outside the place or thing to be searched pursuant to the warrant, *i.e.*, the residence, the warrant itself did not allow for a search of his person while he was being detained. *Id.* at 694. The Court stated as follows:

> The State attempts to justify the eventual search of respondent's person by arguing that the authority to search premises granted by the warrant implicitly included the authority to search persons on those premises, just as that authority included an authorization to search furniture and containers in which the particular things described might be concealed. But . . . even if otherwise acceptable, this argument could not justify the initial detention of respondent *outside* the premises described in the warrant.

Id. (emphasis added).

Because a search warrant does not extend beyond the place or thing to be searched, *see id.*, and because the original search warrant in this case authorized only the searches of Mr. Russo's residence and motorcycle (R., p.134), the search of

Mr. Russo's person (and, by extension, the phone found on his person), while he was outside his residence, was clearly not conducted in accordance with the warrant. Thus, that search is presumptively unconstitutional and it is the State's burden to demonstrate that a well recognized exception to the warrant requirement applies.

2. Even If Mr. Russo Was Validly Detained, Under The Standards Set Forth In *Terry v. Ohio*, 392 U.S. 1 (1968), There Was No Basis To Search Him For Weapons And, Even If There Was, The Officers' Search Of Mr. Russo's Phone Far Exceeded What Was Permissible Under *Terry*

When police officers detain occupants of residences being searched pursuant to magistrate-issued warrants, they need not due so at undue undue personal risk. Thus, in *Muehler v. Mena*, 544 U.S. 93 (2005), the Supreme Court held that it was constitutionally permissible for officers to handcuff the detain occupants of the residence being searched because, under the facts of that case, the execution of the warrant was "inherently dangerous."[15] *Id.* at 99-100.

Likewise, many courts have held that it is constitutionally permissible for officers to frisk the detained occupants of the residence being searched where the officers have a reasonable articulable suspicion that the detainees are armed and dangerous. For example, in *Germany v. United States*, 984 A.2d 1217 (D.C. Cir. 2009), the D.C. Circuit held that, under "the totality of the circumstances" (which included the facts that officers were searching for both guns and drugs, it was dark, the officers were badly outnumbered by the "partying" occupants, and the defendant was wearing a coat under which a weapon could be concealed), the officers had a "reasonable, articulable suspicion that appellant might be armed and dangerous," such that they "acted lawfully

[15] In *Mena*, officers were searching for weapons in the residence of a wanted gang member, and the officers were outnumbered at a 2:1 ratio. *Mena*, 544 U.S. at 100.

in performing a pat-down frisk of appellant for weapons." *Id.* at 1228-30. The *Germany* Court was very clear, however, in explaining that the "pat-down frisk" approved of was no more intrusive than the limited search authorized in *Terry*, *see id.* at 1222 n.7, and that, by approving of the pat-down frisk in that case, it most certainly was "not hold[ing] that, in every case, police may frisk all occupants of a residence being searched pursuant to a warrant" because, "[a]s Professor LaFave aptly puts it, 'it remains clear that there is no authority justifying the police to "routinely" frisk those present at any search warrant execution.'" *Id.* at 1230 n.19 (quoting 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.9(d) (4th ed. Supp. 2009-10)).

Apparently, most jurisdictions are in accord with the D.C. Circuit on this issue. *See Germany*, 984 A.2d at 1230 n.19 (compiling cases wherein other courts had approved of *Terry* frisks of detainees at search warrant executions, based on the theory that there was reasonable basis to believe that those detainees were armed and dangerous). Certainly Idaho is one such jurisdiction. In *State v. Kester*, 137 Idaho 643 (Ct. App. 2002), the Court of Appeals applied the *Terry* standard to a situation in which, while police were executing a warrant at a residence, an individual approached that residence and was detained pursuant to *Summers*, *supra*. *Id.* at 459-61. The Court of Appeals held that the subsequent frisk of that individual was constitutionally permissible because, under the facts of that case (it was late at night; the individual supplied a dubious explanation for why he was present; officers were investigating a suspected guns-for-drugs operation; and the individual was wearing a "fanny pack" which could have concealed a weapon), it was reasonable to believe that the individual was armed and dangerous, and engaged in criminal activity. *Id.* at 461.

In light of this standard, the first question in this case is whether, when Detective Pelfreyman and Cain detained Mr. Russo, there was evidence to support a reasonable articulable suspicion that he was armed and presently dangerous. Mr. Russo submits that there was no such evidence. It was nearly noon, so lighting would not have been a concern; Mr. Russo was alone and, therefore, outnumbered by the officers; Mr. Russo was wearing jeans and a shirt (R., p.142) and, therefore, would have had little opportunity to conceal a weapon; and Mr. Russo was already in handcuffs by the time he was searched (*see* R., p.142), so even if he had a weapon, it would have been difficult, if not impossible, to access and use effectively. Moreover, the district court specifically found that "[t]he officers had not observed the defendant to do anything illegal. The officers did not see the defendant with any weapon. And the officers did not see the defendant act in a threatening manner." (1/27/10 Tr., p.68, L.24 – p.69, L.2.) The only fact which could have raised any security concern for the officers at all was that J.W.'s rapist used a knife to gain her compliance; however, the officers would have had no reason to suspect that (even assuming they had the right suspect in their midst) Mr. Russo still had the knife on him, hours after the rape, as he checked his mail. In short, there was no reasonable basis to believe that Mr. Russo was armed and dangerous when he was detained by the police and, therefore, the search of his person was impermissible under *Terry* and *Kester*.

Even if the pat-down frisk of Mr. Russo's person was somehow permissible though, the fact is that once his cell phone was identified as such—and certainly once it was removed from Mr. Russo's reach—it was not subject to further search. First, a phone is not a weapon, so once the item in Mr. Russo's pocket was identified as a phone, the officers had no right to invade Mr. Russo's privacy further by seizing it or

searching its contents. *State v. Faith*, 141 Idaho 728, 730 (Ct. App. 2005) ("After satisfying themselves that the item was a container and not a weapon, however, the officers had no valid reason to further invade Faith's right to be free of police intrusion absent reasonable cause to arrest him. . . . We conclude that the officers' removal of the Altoids tin from Faith's person was beyond the permissible limits of *Terry* and was a violation of Faith's Fourth Amendment right to be free from an unreasonable search.").

Second, even if the cell phone itself is considered to be a weapon, the data stored on a cell phone is not, under any circumstances, a weapon. Accordingly, an officer would never be within his rights to peruse the contents of a cell phone as part of a protective frisk. *See Terry*, 392 U.S. at 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

Third, to the extent that a cell phone or its contents could somehow be construed as posing a threat to the detaining officers, as soon as that phone was taken out of Mr. Russo's reach, it ceased to be a threat and, therefore, could not be searched further. *See Faith*, 141 Idaho at 730-31 (holding that even if officers were concerned that an Altoids tin might contain a weapon, once that tin was removed from the handcuffed suspect's reach, it could no longer be construed as posing a threat and, therefore, "[t]he opening of the box and inspection of its contents was unlawful"). In other words, as soon as the risk attendant to the item in question abates, so too does the justification for the search of that item. *See id.*; *cf. Arizona v. Gant*, 556 U.S. 332, 343 (2011) (making it clear that in a search incident to arrest, officers may search the

arrestee's vehicle for officer safety reasons only to the extent that the vehicle, and any weapons that may be contained therein, are reasonably within the arrestee's reach).

In light of the foregoing, it is incontrovertible that the removal of the cell phone from Mr. Russo's pants pocket, and the subsequent search of the data stored on that cell phone, cannot be justified under the *Terry* frisk exception to the warrant requirement. Accordingly, the State failed to establish that a well-recognized exception to the warrant requirement applies in this case and it is apparent that Mr. Russo's rights were violated.

3. Because The "Inevitable Discovery" Doctrine Has No Application In This Case, The Exclusionary Rule Applies And The District Court Erred In Failing To Suppress The Cell Phone Video

"The exclusionary rule is the judicial remedy for addressing illegal searches and bars the admission or use of evidence gathered pursuant to an illegal search." *State v. Bunting*, 142 Idaho 908, 915 (Ct. App. 2006) (*citing Stuart v. State*, 136 Idaho 490, 496 (2001)). While there are some exceptions to the general rule requiring the exclusion of illegally obtained evidence, the State bears the burden of pleading of proving these exceptions by a preponderance of the evidence. *See Nix v. Williams*, 467 U.S. 431, 444-45 & n.5 (1984).

One exception to the exclusionary rule is the so-called "inevitable discovery" doctrine. *See id.* at 441-48. In order for the inevitable discovery doctrine to apply, the State must show by a preponderance of the evidence that the information at issue would have independently been discovered through lawful means. *Bunting*, 142 Idaho at 915.

In applying the inevitable discovery doctrine and determining whether the evidence at issue would have inevitably been discovered through lawful means independent of the illegal search, the reviewing court is not permitted to assume the hypothetical of what would have been discovered had the officer acted lawfully. Rather, there must be a showing that some other independent action was already taking place, or had taken place, that would have revealed the same evidence. *Id.* at 916-917. The *Bunting* Court made this abundantly clear:

> The underlying rationale of the inevitable discovery doctrine is that a preponderance of the evidence proves that some action that actually took place, or was in the process of taking place, would have led to the discovery of the evidence that was already obtained through unlawful police action. The inevitable discovery doctrine was not intended to allow a court to consider what actions the authorities should or could have taken and in doing so then determine that lawful discovery of the already unlawfully obtained evidence would have been inevitable.

Bunting, 142 Idaho at 916-917 (internal citations omitted) (emphasis added). In fact, more than 25 years ago, the Court of Appeals put it more bluntly: "The [inevitable discovery] doctrine 'is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did.'" *State v. Holman*, 109 Idaho 382, 392 (Ct. App. 1985) (quoting Judge Burnett's concurring opinion in *State v. Cook*, 106 Idaho 209, 226 (Ct. App. 1984)). Thus, recently, in *State v. Liechty*, 152 Idaho 163, __, 267 P.3d 1278, 1285 (Ct. App. 2011), the Court of Appeals declined to apply the inevitable discovery exception to the exclusionary rule just because an investigation *may* have reached the same result absent the Fourth Amendment violation. The *Liechty* Court observed as follows:

> [T]he issue before us whether an additional line of investigation would have revealed the [contraband], not whether the evidence would have been discovered had the encounter between the officer and Liechty not occurred while the officer was standing in the open passenger doorway [the Fourth Amendment violation]. Indeed, we decline to predict how such

> a conversation would have unfolded. The record does not disclose any additional line of investigation and, as a result, the inevitable discovery doctrine does not apply.

Liechty, 267 P.3d at 1285.

In this case, the inevitable discovery doctrine has no application. The State's argument below was that, even had the detectives not (impermissibly) searched Mr. Russo's phone when they did, once they realized that he had a phone on his person, they would have obtained a new search warrant (such as the amended warrant that was actually issued in this case) authorizing a search of that phone.[16] (*See* 1/27/10 Tr., p.44, Ls.2-6; R., p.119.) This, however, would not have been an independent line of investigation; it would have simply been a continuation of the already-existing line of investigation, which does not satisfy the standards of the inevitable discovery doctrine. *See Liechty*, 267 P.3d at 1285; *Bunting*, 142 Idaho at 916-917; *Holman*, 109 Idaho at 392. Furthermore, simply asserting that, had the officers not searched the phone illegally they would have obtained a warrant to search that phone is doing nothing more substituting what the police should have done for what they really did. Again, this fails to satisfy the standards of inevitable discovery doctrine. *Holman*, 109 Idaho at 392.

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[16] Insofar as the State attempts to argue that the contents of the phone would have inevitably been discovered because of issuance of the actual amended search warrant in this case, that argument would be absurd because the State used the fruits of its illegal search of that phone to obtain the amended warrant. (R., p.154 (stating in the affidavit in support of the request for an amended warrant that "a cellular phone was recovered from Mr. Russo's person during a pat down search for officer safety. This phone was opened and looked at to determine ownership. Your affiant knows that a video was located on that phone that appears to depict the victim from this morning's rape. . . . Your affiant requests permission to search the entirety of the phone).) Not only does this satisfy the inevitable discovery doctrine's requirement of an independent line of investigation, but it also violates the basic principle that a search that is unlawful at its inception cannot be validated by what it turns up. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

Likewise, the district court's application of the inevitable discovery doctrine was in error, albeit for a different reason. This district court concluded that it was inevitable that the cell phone video would have been discovered because, even though the original search warrant had not arrived yet, that warrant had been issued and it authorized a search for phones, which implicitly authorized a forensic search of those phones. (1/27/10 Tr., p.81, L.22 – p.83, L.23.) Thus, the district court appears to have assumed that, had the original search warrant been present on-scene, it would have authorized a search of Mr. Russo's person and the cell phone kept on his person. (*See* 1/27/10 Tr., p.81, L.22 – p.83, L.23.) However, this reason is flawed since, for the reasons set forth in Part I(C)(1), *supra*, a search warrant authorizing a search of a residence does not extend to the person of someone detained *outside* the residence.

Based on the foregoing, Mr. Russo submits that the State has failed to prove that an exception to the exclusionary rule applies and, therefore, the district court erred in failing to suppress the evidence obtained in the illegal search of Mr. Russo's phone.

II.

The District Court Erred In Allowing The State To Offer Irrelevant, Highly Prejudicial Evidence And Argument Concerning Mr. Russo's Deviant Sexual Interests

A. Introduction

Under Idaho Rule of Evidence 404, evidence of a defendant's bad character or bad acts may not admitted to show that the he is a person who acted in conformance with his bad character. Evidence of the defendant's bad acts may be admitted for other purposes though, such as to prove motive, intent, or plan.

In this case, the district court allowed the State to present evidence that Mr. Russo has had sexual fantasies involving rape, and that he possessed pornography

depicting simulated rape, ostensibly to show that the Mr. Russo had the motive, intent, and plan to rape J.W. However, because the rape fantasy and rape pornography evidence does not evidence any motive, intent, or plan on Mr. Russo's part to rape J.W. and because, even if it did, its probative value was so substantially outweighed by its prejudicial effect, the district court erred in allowing the State to present this evidence to the jury.

B. Applicable Legal Standards

The Idaho Rules of Evidence provide that, generally speaking, evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." I.R.E. 404(b). However, such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." *Id.*

Under I.R.E. 404(b), there is a two-tiered analysis for determining the admissibility of "prior bad act" evidence. *State v. Grist*, 147 Idaho 49, 52 (2009). The court must first "determine whether there is sufficient evidence to establish the other crime or wrong as fact" and "whether the fact of another crime or wrong, if established, would be relevant . . . to a material and disputed issue concerning the crime charged, other than propensity." *Id.* If the evidence is insufficient to establish the other crime or wrong as fact, or if the other crime or wrong, even if proven, is not relevant to an issue other than character or propensity, it is inadmissible and the inquiry ends. *See id.* However, if the evidence is sufficient to prove the other crime or wrong, and that crime or wrong is relevant to some valid issue, the court must then "engage in a balancing

under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id.*

Turning to the question of the applicable standard of review, the Idaho Court of Appeals has held that the district court's determination that the evidence in question is relevant to some issue besides the defendant's bad character is reviewed *de novo*, but the district court's balancing of the probative value of the evidence against the unfair prejudice to the defendant is reviewed for an abuse of discretion. *State v. Miller*, 141 Idaho 148, 150 (Ct. App. 2004).

C. The District Court Erred In Allowing The State To Offer Irrelevant, Highly Prejudicial Evidence And Argument Concerning Mr. Russo's Deviant Sexual Interests

As noted, prior to Mr. Russo's trial, the State sought leave to offer extensive evidence of Mr. Russo's other crimes, wrongs, or acts, including evidence that he has had sexual fantasies about rape and has possessed pornography depicting simulated rape. The State argued that the fantasy and pornography evidence was relevant to a non-character/non-propensity issue—Mr. Russo's motive, intent, or plan—and, therefore, was admissible under I.R.E. 404(b). (R., pp.45, 59-60, 88, 187-227, 228-35, 237; 3/18/10 Tr., p.8, L.14 – p.19, L.11; 5/11/10 Tr., p.3, L.15 – p.4, L.19, p.5, L.20 – p.6, L.17, p.9, L.20 – p.11, L.3.) The district court agreed, and it ruled the rape fantasy and rape pornography evidence admissible. (*See* R., pp.175-76, 243; 3/18/10 Tr., p.67, L.14 – p.69, L.9, p.77, L.25 – p.78, L.10; 4/22/10 Tr., p.8, L.21 – p.9, L.13; 5/11/10 Tr., p.18, L.7 – p.25, L.22, p.29, L.23 – p.31, L.23.)

Mr. Russo contends that the district court's ruling was in error, as it was based on a faulty application of the *Grist* standard. Specifically, Mr. Russo asserts that the rape

fantasy and rape pornography evidence is not relevant to any proper purpose and, even if it is marginally relevant, its probative value was substantially outweighed by the risk of unfair prejudice.

1. The Rape Fantasy And Rape Pornography Evidence In This Case Was Relevant Only To Mr. Russo's Character

Taken together, evidence of Mr. Russo's sexual fantasies involving rape and his possession of pornography depicting simulated rape tend to show only that Mr. Russo is sexually aroused by the thought and/or depiction of rape. It is not probative of whether he was the one who actually raped J.W. on August 27, 2009; nor is it probative of any actual plan or intent to rape J.W. Indeed, the only way that this evidence can be characterized as showing Mr. Russo's intent or plan to rape is to assume that because Mr. Russo has a predilection for rape, he must have planned or intended to act in conformity with that predilection; however, this is precisely the type of baseless generalization that Rule 404 is intended to guard against. That Rule makes it clear that, just because someone has done a certain act, shown a certain propensity, or exhibited a certain character trait in the past, one cannot assume that he acted accordingly on the date in question. *See* I.R.E. 404. Indeed, in this case, the prosecution never attempted—either in arguing its motions *in limine*, or in arguing its case to the jury at trial—to connect Mr. Russo's predilection for rape to any particular plan or scheme to rape J.W.[17]

The only (proper) issue that Mr. Russo's predilection for rape could *possibly* be relevant to would be motive. The theory, perhaps, would be that, given Mr. Russo's

predilections, he raped J.W. to satisfy his sexual desires; under this argument, sexual gratification would be the motive. However, such an argument would make little sense in a case such as this one. Quite obviously, anyone who breaks into a young woman's apartment, clearly for the sole purpose of raping her, does so for the purpose of sating his sexual urges. Thus, motive is simply not at issue in this case. *Cf. State v. Roach*, 109 Idaho 973, 974-75 (Ct. App. 1985) (holding that even in the case of a specific intent crime, such as lewd conduct with a minor, because "the intent needed to convict can be manifested by the circumstances attending the act," the defendant's intent may not be sufficiently at issue in the case to warrant introduction of "other crimes" evidence aimed at proving intent). Moreover, even if the motive of sexual gratification were somehow relevant to this case, this motive has in no way been shown to be specific to J.W. Accordingly, even if Mr. Russo had a motive to rape generally, this motive in no way connects him particularly to the rape of J.W.

2. Even If The Rape Fantasy And Rape Pornography Evidence In This Case Was Relevant To Such Proper Topics As Motive, Intent, Or Plan, It Was Nonetheless Inadmissible Because Its Probative Value Was Substantially Outweighed By The Risk Of Unfair Prejudice To Mr. Russo

Assuming *arguendo* that there is some relevance to the evidence demonstrating Mr. Russo's predilection for rape, the probative value of any such evidence is substantially outweighed by the risk of unfair prejudice attendant to that evidence. Accordingly, he contends that the district court erred in finding it admissible under Rule 404(b).

[17] Certainly, the State did raise the inference that J.W.'s rape was a carefully planned crime. And the evidence supports this inference. But the State never attempted to explain how Mr. Russo's rape fetish connected to any particular plan.

Initially, as noted in Part II(C)(1), *supra*, it is Mr. Russo's contention that evidence of his rape fantasies and his possession of pornography depicting simulated rape is wholly irrelevant to anything other than character or propensity; in particular, he contends that it is not relevant to motive, intent, or plan. However, even if this Court determines that such evidence is relevant to an issue such as motive, intent, or plan, Mr. Russo contends that it is only marginally relevant (for same reasons, set forth above, that he contends that it is not relevant at all).

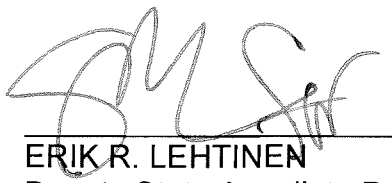
More importantly, Mr. Russo contends that this evidence is extraordinarily prejudicial. As noted, it demonstrates a predilection for rape which, in the average juror's mind, would likely be viewed as an extremely deviant and disturbing preference. Moreover, the Idaho Supreme Court has recognized that, traditionally, there has been an "unstated belief that sexual deviancy is a character trait of especially powerful probative value for predicting a defendant's behavior," *State v. Field*, 144 Idaho 559, 569-70 (2007) (quoting D. Craig Lewis, *Idaho Trial Handbook* § 13.9 (1995)), so any such evidence would tend to have a significant impact on the jury's verdict. Thus, in recent years, the Idaho courts have repeatedly recognized that evidence of extreme sexual deviancy is simply too prejudicial to the defendant to be put before the jury where its probative value is marginal. *See, e.g., State v. Pokorney*, 149 Idaho 459, 466 (Ct. App. 2010) ("[T]here was a high risk that the jury would convict Pokorney based upon propensity and sexual deviancy. We are constrained to conclude that the unfair prejudice substantially outweighed the probative value of the evidence."); *State v. Johnson*, 148 Idaho 664, 669-70 (2010) (finding that the error in admitting prior instances of the defendant's sexual misconduct with children was not harmless because "[e]vidence of prior sexual misconduct with young children is so prejudicial that there is

a reasonable possibility this error contributed to Johnson's conviction"). As this is just such a case, it is apparent that the district court erred in concluding that the probative value of the rape fantasy and rape pornography evidence was not substantially outweighed by the risk of unfair prejudice and, therefore, the district court erred in admitting that evidence.

CONCLUSION

For the foregoing reasons, Mr. Russo respectfully requests that this Court reverse the district court orders denying suppression of the cell phone video and admitting evidence of his sexual fantasies and pornography; that it vacate his convictions and sentences; and that it remand his case for a new trial.

DATED this 20th day of March, 2012.



ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

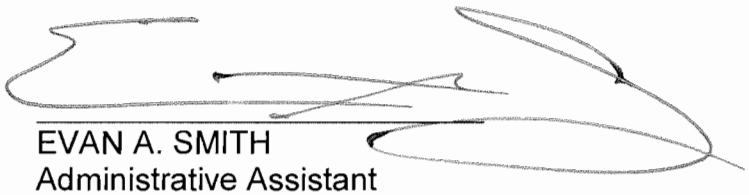
I HEREBY CERTIFY that on this 20th day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL RUSSO
INMATE #85602
ICC
PO BOX 70010
BOISE ID 83707

GREGORY M CULET
DISTRICT COURT JUDGE
E-MAILED BRIEF

ROB TILLEY
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

ERL/eas